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3. Where a deed conveyed a life estate, and the grantee remained in possession thirty years or more, the heirs of the grantor setting up no claim to the reversion; *Held*, that the occupancy for so long a period becomes in itself an independent source of title. *Osborne* v. *Anderson*, 261.

4. In locating the boundaries of land, the calls in the deed must be fulfilled and effect given to the descriptive words used in it. *Ib.*

5. Under the act of 1874–'75, ch. 256, an action of ejectment may be maintained by a grantee in his own name whenever the grantor has the right to sue, notwithstanding the person in actual possession claims under a title adverse to that of such grantor. *Ib.*

6. In ejectment, the court submitted an issue to the jury under which the location of a disputed line could be found by them, but refused to submit one proposed by defendant, as to whether the plaintiff agreed to the running and marking the line by a surveyor, and that defendant might take possession under said agreement; *Held*, no error, as the same was not material to the case or raised by the pleadings. *Overcash* v. *Kitchie*, 384.

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1. The record of a case on appeal certified to this court, must be taken as importing verity, and cannot be explained or contradicted by matter *de hors*. *McDaniel* v. *King*, 29.
2. An appellant is not entitled to a new trial, or to *mandamus* commanding the judge to send up a correct statement of the case, upon an affidavit that the case as settled by the judge does not correctly set forth the grounds of exception. He may apply for a *certiorari*. *Ib.*
3. An appeal will be dismissed where it satisfactorily appears that the question of costs is the only matter involved. *Hasty* v. *Funderburk*, 93.
4. An appeal will be dismissed on motion of the appellee, if it is not perfected according to law. *Harshaw* v. *McDowell*, 181.

5. In all cases of appeal, except *in forma pauperis*, a written undertaking is required (unless properly waived), and one of the sureties must make affidavitt that he is worth double the amount specified therein. THE CODE, §§552, 560. *Ib.*

6. The justification of a surety to an undertaking on appeal, must be made by the surety himself. The affidavit of another as to the pecuniary reputation of the surety will not answer the demands of the law. See preceding case. *Morphew* v. *Tatem*, 183.

7. Where a judge goes out of office before preparing a case on appeal, a new trial will be awarded unless the parties agree upon a statement of the case. The *certiorari* applied for is granted to afford the parties an opportunity to adjust their differences in the premises. *Shelton* v. *Shelton*, 185.

8. No appeal lies, where the rulings upon exceptions to a referee's report and an order of recommittal do not affect the substantial rights of either party. *Lutz* v. *Cline* 186.

9. An appeal from an order sustaining some of the exceptions to a referee's report and overruling others, and recommitting the report with instructions to correct the same in conformity to the ruling of the court, is premature, and will be dismissed. Upon the coming in of the report and the rendition of a final judgment, all the exceptions can be noted and passed upon in one appeal. *Jones* v. *Call*, 188.

10. A *certiorari* will be granted where the party is in no default, but has been diligent in his efforts to take an appeal. *Roulhac* v. *Miller*, 100.

11. Where the papers in a case were sent to the judge to be returned after the expiration of the term, with his judgment therein; *Held*, that the party intending to appeal, if the judgment should be against him, and who made repeated inquiries of the clerk of the court about the return of the papers, and lost his right of appeal by reason of the lack of information of the clerk as to the time when the same were filed, is entitled to the writ of *certiorari*. *Ib.*

12. In such case it must appear that there is reasonable ground for the appeal that was lost—not that the cause therefor would avail the party in this court. *Ib.*

13. The right to the writ is not affected by the denial of the petitioner's motion for an injunction against collecting the judgment, as that motion was made in a separate and distinct action from the one in which the petitioner desired to appeal. *Ib.*

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ARBITRATION AND AWARD.

1. Where a cause is referred to arbitrators the submission to be a rule of court, the court enters judgment according to the award. The arbitrators are not bound to find the facts, or to state them separately from their conclusions of law, or to decide according to law. Distinction between a reference to arbitrators and a reference under THE CODE, §422, noted by ASHE, J. *Keener* v. *Goodson*, 273.

2. An award in writing, like a written contract, cannot be added to or varied. It speaks for itself, and is not open to proof of the "understanding" of the arbitrators as to its effect. *Scott* v. *Green*, 278.

ARREST:

1. A peace officer may justify an arrest without a warrant, when he shows satisfactory reasons for his belief of the fact and the guilt of the suspected party, and that delay in procuring a warrant might enable the party to escape. In such case, proof of the actual commission of the crime is not necessary. *Neal* v. *Joyner*, 287.

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2. Upon motion to vacate such warrant, the judge may consider affidavits and any proper evidence adduced by the respective parties, to establish or controvert the allegations of the affidavit upon which the warrant issued; and his findings of fact upon the same are conclusive. *Ib.*

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1. The comments of counsel in this case are not of such a character as will warrant a new trial; the rule, as heretofore laid down, announced and approved. *Overcash* v. *Kitchie*, 384.
2. Exceptions to remarks of counsel must be taken in apt time. No abuse of privilege appears in this case. *State* v. *Suggs*, 527.

3. Counsel will not be allowed to impeach a witness by reading a paper, in his argument to the jury, which had not been put in evidence. *State* v. *Bryan*, 531.

4. It is only in extreme cases of abuse of the privilege of counsel, and when the same is not checked by the presiding judge and the jury not properly cautioned, that this court will interfere and grant a new trial. *Ib.*

5. Comments of counsel, alleged to be improper, cannot be assigned as ground for a new trial, where it appears that no objection was made at the time, and that the judge, in his charge to the jury, gave them due caution not to be influenced thereby. *State* v. *Sheets*, 543—4.

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2. *Quære*—As to the extent of the liability of common carriers by sea, and how far the same has been modified by act of Congress, which exempts the owner of a vessel from responsibility by reason of fire on board ship, unless caused by the negligence of such owner. *Ib.*

3. The stipulation for such exemption from responsibility must be just and reasonable in the eye of the law, and hence it is not lawful to so stipulate for the negligence of the carrier or its agents. *Ib.*

4. The facts of this case do not show a copartnership, but merely an association between the lines of road—each undertaking to transport freight safely over its own road and to act as an agent in forwarding the same to the next connecting road. *Ib.*

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2. The law presumes the criminal intent in such case, and the defendant must likewise rebut this presumption. *Ib.*

3. The language of the statute is, not "concealed *on* his person," but "concealed *about* his person," and hence, if the weapon be within reach and control of the defendant, it is sufficient to bring the case within the meaning of the statute. *Ib.*

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2. The constitutional provision, to the effect that the general assembly cannot deprive the judicial department of any power which rightly pertains to it, is not infringed by the legislature in specifying what acts shall constitute a contempt. *Ib.*

3. A rule was obtained for alleged contempt in not performing a judgment of court, based upon an affidavit declaring a belief that the respondent "is able and has sufficient means" to do so, but sets forth no facts upon which such belief is grounded; and in answer, the respondent makes affidavit that his inability to perform the judgment results from his misfortune and necessitous condition, and that he has no intention or desire to injure the opposing party or disobey the mandate of the court; *Held*, that the rule must be discharged. *Boyett* v. *Vaughan*, 27.

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1. Where the plaintiff, by exercise of his right of election, rescinded his contract with the defendant, and brought suit for damages for a breach thereof, *it was held* competent for the plaintiff to show, as upon a *quantum meruit*, what was agreed to be paid under the contract for the services of himself and employees, in addition to the value of his personal labor, actual outlay and liability in the prosecution of the work, as bearing on the question of the measure of damages. See same case, 82 N. C., 252. *Jones* v. *Mial*, 89.

2. Where a promise is made to A to pay him one hundred dollars if he will buy B's land, and thereupon A buys the land; *Held*, that in an action by A against the promisor to recover the one hundred dollars, the statute of frauds has no application. The subject of the action is neither a contract for the purchase of an interest in land nor a promise to pay the debt of another. *Little* v. *McCarter*, 233.

3. The consideration necessary to support a promise must be a benefit to the party promising, or attended with trouble and inconvenience to the other party. The facts of this case show there was a sufficient consideration. *Ib.*

4. A contract, wherein the vendor agrees to sell the vendee "any of my black walnut trees, not exceeding fifteen in number, that will girth eight feet six inches in circumference and under ten feet, at two dollars each; and all trees measuring ten feet in circumference and upwards, at two dollars and a half each," giving the right of way across the vendor's land to fell and remove the timber, is sufficiently definite to admit parol proof of the property sold. *Dunkart* v. *Rineheart*, 354.

5. Where the plaintiff vendee brought an action for specific performance against the vendor and those to whom he subsequently contracted to convey the land whereon the trees were standing, *it was held* competent to inquire whether the vendor had a tract of land on which such trees were to be found; and if he had, the identity of the trees could be ascertained by the terms of description in the contract. *Ib.*

6. *Held further:* If there were more than fifteen such trees on the land, the contract was ineffectual to pass title to any, on account of the uncertainty as to which trees were meant. But in this case the proof that there were not fifteen trees on the land which answered the description in the contract, removes such uncertainty and establishes the title in the vendee. *Ib.*

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2. The complaint in this case alleging negligence, is sufficiently explicit in the statement of facts constituting such negligence. *Ib.*
3. The proper mode of bringing into court a corporation charged with a criminal offence is by service of a copy of the summons upon one of its officers or agents. The acts of assembly in reference to service of process in civil and criminal cases reviewed by SMITH, C. J. *State* v. *Railroad*, 584.
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COSTS OF PROSECUTION:

1. A bond executed by the prosecutor to pay the costs of a criminal action, the matter being then compromised by entering a *nolle prosequi*, and the accused paying the prosecutor a sum of money, is against public policy and void. *Commissioners* v. *March*, 268.
2. The statute in force at the time of this proceeding in reference to taxing a prosecutor with costs does not provide for a case where a *nolle prosequi* is entered. *Ib.*
3. The "costs of prosecution" are those incurred in the conduct of the prosecution, and do not include the costs incurred by defendant in resisting the prosecution. *State* v. *Wallin*, 578.
4. Where a defendant is taxed with the costs of prosecution, a witness, though summoned by the defendant and examined in his defence, has no right to have his ticket allowed in the bill of costs. It is a personal debt of the defendant, the payment of which the witness may enforce by suing out execution in the cause. *Ib.*

5. But costs of prosecution against a prosecutor (upon acquittal of the accused or *nolle prosequi* entered), or against the accused upon a verdict of guilty, or a fine imposed, does not constitute a debt within article one, section sixteen, of the constitution, and hence the defendant may be imprisoned for non-payment of the same. *Ib.*

6. It is error in the superior court of one county to tax the prosecutor in a criminal action in that court with costs of prosecution in a like action pending in another county. *State* v. *Horton*, 581.

7. The court cannot tax the prosecutor with cost where the grand jury ignore the bill of indictment. *Ib.*

8. A motion to set aside a judgment, taxing the prosecutor with costs, upon the ground of excusable negligence, must be made within twelve months after the judgment is rendered. The presence of the prosecutor is not essential to the validity of the judgment. *Ib.*

COUNTERCLAIM:

1. A counterclaim is where the answer sets up a cause of action upon which the defendant might have sustained a suit against the plaintiff, and the answer in such case must contain the substance of a complaint with a concise statement of the facts constituting a cause of action. *Garrett* v. *Love*, 205.

2. Equitable counterclaim, sufficient to defeat action of ejectment, 78 (3).

3. Mistake in transaction may be set up as a counterclaim, 205 (2). When relied on, 237 (2, 3).

COUNTIES AND COUNTY COMMISSIONERS:

1. An action upon a county treasurer's bond to recover an amount alleged to be due the county, must be brought on the relation of the commissioners and not by the successor treasurer. *Wescott* v. *Thees*, 55.

2. The treasurer of a county is entitled to one and a half per cent. commissions on receipts and one and a half on disbursements; but the exception to the referee's report, in this case, that he failed to charge the defendant with commissions paid him in excess of those allowed by law, has no foundation, and will not be sustained—the balance found due the defendant being larger than the amount of the excess of legal commissions. *Ib.*

3. An action upon an official bond may be brought within six years after a breach thereof: the statute does not begin to run from the date, but only from the breach of the bond. *Commissioners* v. *MacRae*, 95.

4. A settlement had between a county and its out-going treasurer, does not operate a discharge of liability upon his bond; nor is it *conclu-*

sire evidence of a proper accounting, but is open to proof that a mistake was made. *Ib.*

5. The actual payment of the funds remaining in defendant's hands will alone relieve the bond of liability, and it is his duty to know to what fund the money in hand belongs. *Ib.*

6. The legislature may confer upon a county the power to create debts for necessary expenses, without the approval of "a majority of the qualified voters" in the county. Const., Art. VII, §7. And the county authorities are the sole judges of what are "necessary expenses." *Evans* v. *Commissioners*, 154, and *Halcombe* v. *Commissioners*, 346.

7. Under an act of assembly to enable the people of Cumberland to establish a free bridge over the Cape Fear river, the county authorities were authorized to issue bonds and levy a tax to meet the expenses of the same; *Held*, that a motion for an injunction against the exercise of the power was properly refused. *Ib.*

8. The commissioners of a county do not possess the arbitrary power of suppressing all places of retailing spirituous liquors; nor are they bound to license an applicant, though he be qualified by proof of good moral character. *Muller* v. *Commissioners*, 171.

9. They have a limited legal discretion; and in passing upon an application for a license, they have a right to take into consideration the questions, whether the demands of the public require an increase of such accommodations, and whether the place it is proposed to establish a bar-room is a suitable one. THE CODE, §3701, construed by ASHE, J. *Ib.*

10. Under article seven, section seven of the constitution, the approval of a majority of the qualified voters is not required to enable the commissioners to exercise the power conferred by the legislature of levying a tax to meet necessary expenses—here, the building of a courthouse. *Halcombe* v. *Commissioners*, 346.

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1. An assignment of property by one to secure creditors, in which are enumerated all mortgages, liens, &c., embraces the property in a horse, the title to which had been retained by the assignor as a security for the price. *Watson* v. *Dobbin*, 107.

2. In an action to cancel a deed which the plaintiff alleged was executed to his son by mistake, the plaintiff, with a view to show that he would not convey so much property to his son without reserving a sufficiency for himself, was allowed to prove the extent and value of the land; *Held*, no error, especially when the defendant had proved that, about the same time, the plaintiff had conveyed to him all his personal property as well as the land. In such case it was not improper in the court to allow equal latitude to both parties. *Miller* v. *Miller*, 209.

3. *Held further*, if the alleged mistake be established, the defendant has no deed in contemplation of equity, and the plaintiff is entitled to have the same cancelled. *Ib.*

4. A sheriff's deed made to a purchaser of land for taxes within the twelve months after the sale, is void, and passes no title. The act of 1872-'73, ch. 115, §§30—33, construed by ASHE, J. *Ward* v. *Phillips*, 215.

5. A deed of husband and wife conveying an estate in fee to a son and reserving a life estate in themselves creates no change in the relations of the grantors to each other, and they hold the life estate by entireties, with the remainder to the grantee; and upon the death of the husband the widow becomes sole tenant for life. *Jones* v. *Potter*, 220.

6. The grantee under such deed has no right to lease the land during the continuance of the life estate, and one in possession under such contract is a trespasser as against the life tenant or her lessee, and not entitled to notice to quit or demand for possession before suit brought. *Ib.*

7. Recitals in a sheriff's deed are *prima facie* evidence of an execution sale, notwithstanding the return upon the execution may be imperfect. The fact that there was a sale may also be proved by parol. *Miller* v. *Miller*, 402.

8. *Held further*, that parol testimony is admissible to show that the land levied upon was sold as one tract, though described in the sheriff's deed as two tracts. (The evidence in this case goes to show that the land was designated and sold in one body). *Ib.*

9. *Held also*, that the deed in such case, reciting in substance the execution under which the land was sold, and purporting to convey title to the purchaser and his heirs, shows that the sheriff exercised his power in the premises, and conveys the title of the defendant in the execution. *Ib.*

10. A deed is binding on those who execute it, although it appears that, when drawn, others were also to sign it. *Moore* v. *Hinnant*, 455 (1).

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1. Residence, as used in the clause of the constitution defining political rights, is synonymous with domicil, denoting a permanent dwelling place, to which the party, when absent, intends to return. *Hannon* v. *Grizzard*, 115.

2. Upon the trial of an issue as to place of residence, it is competent for the party to prove his intention in respect to it. *Ib.*

3. A protracted residence abroad of one engaged in business and with no home in this state, is not consistent with the idea of a residence here. *Ib.*

4. The plaintiff was in the service of the federal government at Washington, having received an appointment as watchman under the treasury department, but continued to pay poll-tax and vote in this state, and spent a part of each year at his home here; *Held*, that his constitutional residence remained unchanged, and that it was not error to refuse to charge the jury that he had not shown an actual *bona fide* residence in this state, he being a single man and sleeping and boarding in Washington during his stay there while acting as watchman. (Section eleven of the act of 1876–'77, ch. 275, does not undertake to declare what shall constitute a *residence*, as a qualification for voting, but rather to designate the place of voting). *Ib.*

5. Nor was it error to tell the jury that if they believed the testimony of the plaintiff, he had made out his case. This was not an expression of opinion on the proofs. *Ib.*

6. Nor to refuse to permit the jury to take the tax list into their consultation room, without the consent of both parties. *Ib.*

DIVORCE AND ALIMONY:

1. In an application for alimony *pendente lite*, the facts set forth in the complaint must be found by the judge to be true, in order to the relief demanded, and must be stated in the record. *Morris* v. *Morris*, 109.

2. Whether the wife, in such case, is entitled to alimony, is a question of law, upon the facts found, and reviewable on appeal by either party. *Ib.*

3. In divorce, a complaint alleging that defendant has abandoned his wife and turned her out of doors; that he has treated her cruelly and barbarously, so as to endanger her life, and has offered such indignities to her person as to render her condition intolerable and life burdensome, states facts constituting a cause of action. *Griffith* v. *Griffith*, 113.

4. Alimony *pendente lite* may be granted, not simply upon complaint and affidavit of the plaintiff, but upon a finding by the judge (after considering the counter affidavit or answer of the defendant) that the facts alleged in the complaint are true, and entitle the plaintiff to the relief demanded. THE CODE, §1291. And the facts found must be set out in the record of the case on appeal. *Ib.*

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EMBEZZLEMENT:

1. Where goods come into the possession of a servant, out of the ordinary course of his employment, but in pursuance of special directions from the master to receive them, and the servant embezzle the same, he is indictable under the statute. *State* v. *Costin*, 511.
2. *Therefore*, where one employed by a merchant "to sweep out the store, and wait about the store, but not as a clerk," was authorized by the merchant to take a lot of shoes and sell them during a visit to a neighboring town, which he did, and converted the money to his own use; *Held*, that he was a servant within the meaning of the embezzlement act, and received the goods by virtue of his employment. *Ib.*
3. An indictment for embezzlement of money need not state the name of the person from whom the money was received; and the averment that the defendant is neither an apprentice nor under the age of sixteen years, is a substantial compliance with the statute. *State* v. *Lanier*, 517.
4. Distinction between our statute, which makes embezzlement a felony punishable *as* larceny, and the English statute which makes it larceny, noted. The charge of larceny in this indictment may be rejected as surplusage. *Ib.*

ENTICING SERVANTS, indictment for, 553.

ENTIRETIES, 220.

EQUITABLE COUNTERCLAIM, sufficient to defeat ejectment, 78 (3).

EQUITABLE JURISDICTION, 205 (2); exclusive, 377.

EQUITABLE INTEREST:

Assignment of, 264.
Not barred, unless abandoned, &c., 423 (2).

ERRONEOUS JUDGMENT, corrected by appeal, 581 (4).

EVIDENCE:

1. The admissions of a party contained in the pleadings filed in a cause are competent evidence against him, whether the pleadings are verified or not, or signed by the party or his attorney. *Guy* v. *Manuel*, 83.

2. So also, the admissions of attorneys in the conduct of a cause, are admissible in evidence against their clients. *Ib.*

3. The silence of a party in whose presence a statement is made, will not be taken as an acquiescence on his part in the truth of the statement, unless the occasion be one where a reply from him might be properly expected; *Hence*, it was held, that the declarations of deceased persons made in presence of the plaintiff concerning the location of land before his purchase of the same, to which the plaintiff made no reply, are inadmissible against the plaintiff (in an action to recover the land), when offered for the purpose of concluding the plaintiff or giving additional weight to the declarations of the deceased persons. *Ib.* See also, *State* v. *Suggs*, 527.

4. Neither the admission of incompetent nor the rejection of competent evidence, not material to the issue or misleading, is assignable for error. *Commissioners* v. *Lash*, 159.

5. Where incompetent evidence is received without objection, the party affected by it cannot afterwards complain. *Scott* v. *Green*, 278.

6. Evidence was offered to impeach a witness, and exceptions taken to its rejection; *Held*, that this court will not consider the same, where the case fails to set out the testimony of the witness sought to be impeached. The facts necessary to show the alleged error should be stated. *State* v. *Barber*, 523.

7. *Held further*, that the rejection of the proposed evidence is sustained upon the further grounds, that the question put was a leading one, and the "time and place" preparatory to proof impeaching the witness, were not stated. *Ib.*

8. A voluntary confession of one accused of crime, whether made before his apprehension, or after his commitment, is admissible against him. *State* v. *Suggs*, 527.

9. Parol proof of such confession at a preliminary trial is also admissible, where it is affirmatively shown that the magistrate failed to reduce the same to writing. *Ib.*

10. The silence of a party, when a declaration is made in his presence and hearing, imputing to him the commission of a crime, is presumptive evidence of his acquiescence in the truth of the statement. *Ib.* See also, *Guy* v. *Manuel*, *ante*, 83.

11. In malicious mischief, ill-will towards the prosecutor is an essential ingredient of the crime, and as tending to established the same, it is competent to show that the defendant whipped the prosecutor's child shortly before the offence charged was committed. *State* v. *Sheets*, 543.

12. Where part of a certain conversation is elicited from a witness, the opposite party has the right to put the whole conversation in evidence. *Ib.*

13. A physician who states that he is able to give a professional opinion about a particular case (as, for instance, the effect of poison on brute animals), although he has never treated such a case in his practice, is competent to testify as an expert. *Ib.*

EVIDENCE:

Of agency, 225 (2).

In fraud cases, 1, 377 (3).

Of value of land, 15 (1).

Of value of services under contract, 89.

Of settlement, not conclusive, 95 (2).

In cancellation of deed, 209.

Grant, copy of, 321.

Identity of property conveyed, 354.

Of payment of mortgage, 393.

Of execution sale, 402 (4, 6).

In will cases, 433, 441.

In larceny, 469.

In murder, 481.

In assault with intent, &c., 521.

In fornication and adultery, 559.

Of official character, 568.

EXCEPTIONS, 224.

EXCUSABLE NEGLIGENCE:

The defendant employed an attorney to appear for him in a case, but he died about three weeks before the return term of the court; he had filled several public offices, and his death was announced generally in the newspapers; the defendant did not attend at the return term or employ counsel; judgment by default was taken, and of which he was informed; he then proposed a compromise of the claim, but gave the matter no further attention; he failed to attend the next term of the court, when a final judgment was rendered; and, after execution was issued, he moved to set the judgment aside upon the ground of excusable neglect; *Held*, that he is not entitled to relief. *Kivett* v. *Wynne*, 39. See also, page 581 (3).

EXECUTIONS:

1. A sheriff is liable upon his official bond for a failure to apply proceeds of sale of debtor's land in payment of an execution, in his hands at the time of sale, issued upon a judgment having the prior lien. *Titman* v. *Rhyne*, 64.

2. The lien upon land acquired by docketing a judgment cannot be displaced by one subsequently acquired. (The rights of the party under the judgment and execution of this court were lost by not issuing *alias executions*). *Ib.*

EXECUTION SALE, 402 (4—6).

EXECUTORS AND ADMINISTRATORS:

1. An administrator will be held responsible if he is guilty of gross negligence in failing to collect a debt due the intestate's estate; but otherwise, where he in good faith does not engage in a fruitless litigation at the expense of the estate, and his management of the same is such as a prudent man would display in his own business. *Patterson* v. *Wadsworth*, 407.

2. The plea of an administrator of "fully administered and no assets" must be disposed of by submitting an issue to a jury or by reference. *Little* v. *Duncan*, 416.

3. Where an administrator had assets and sets up the statute of limitations against a debt of his intestate (Rev. Code, ch. 65, §11), he must aver and prove that he has properly administered the same, in order that his plea may avail him. If it is ascertained he has no assets, the statute is a complete bar. *Ib.*

See also page 410 (3).

EXECUTORY DEVISES, assignment of, 78.

EXPERT TESTIMONY, 544 (4).

FENCE, indictment for removal of, 551.

FINDINGS OF FACT, in alimony proceeding, 109.

FORBEARANCE, to principal, when surety not released, 44 (3).

FORCIBLE TRESPASS:

1. Forcible trespass is the taking personal property by force, from the possession of another, in his presence; and it is not an essential ele-

ment of the offence that he should oppose the seizure, if he be overawed by the circumstances of the occasion. If the act be done against the will of the possessor, whether he expressly forbid the taking or not, the offence is consummated. *State* v. *Barefoot*, 565.

2. The charge of the judge in reference to the effect of the forbiddance by the wife of the prosecutor in his presence, is not erroneous, under the facts of the case. *Ib.*

3. One of the defendants was *deputed a special officer* to execute the civil process, alluded to in the opinion, but it did not justify him in making the seizure, under the ruling in *Marsh* v. *Williams*, 63 N. C., 371, and the case there cited. *Ib.*

FORNICATION AND ADULTERY:

In fornication and adultery the husband of the female defendant is not a competent witness to testify *against* her, although he may have obtained a decree for divorce *a vinculo matrimonii* before the trial of the indictment. But under THE CODE, §1353, the husband or wife of the defendant is competent to testify *for* him or her in all criminal actions or proceedings. *State* v. *Jones*, 559.

FRAUDS:

In execution of bond, 6.

Statute of, 233 (1).

In court proceedings, 248 (2).

Statute of limitation barring action on ground of, 423.

FRAUD AND FRAUDULENT CONVEYANCES:

1. Fraud alleged in the execution of a deed cannot be proved by evidence of fraud in one subsequently made, unless it be established by proof that the two transactions are part of a concerted purpose to defraud, or that the latter is connected with, or in furtherance of, the objects of the former. *Winborne* v. *Lassiter*, 1.

2. An assignee under a fraudulent deed is not affected by it unless it be shown that he co-operated in the making thereof, or took with notice of the intended fraud. *Cannon* v. *Young*, 264.

3. There is no presumption of the law, arising from the known insolvency of the maker of such deed, that the assignee knew of his intent to defraud creditors. *Ib.*

4. A voluntary deed, executed by an insolvent person, is void *per se* as to creditors; where the deed is made upon a fair consideration it is not necessarily void; and where the transaction is between an insolvent

father and his son, a rebuttable presumption of a fraudulent intent arises from the close relationship of the parties; *Therefore*, where there was evidence tending to show that the deed was supported by a valuable consideration, and the judge charged the jury that if at the time it was executed the bargainor did not retain property sufficient to pay his debts, then in law the deed is void, and failed to submit the question as to the *bona fides* of the transaction, *it was held* to be erroneous. *McCanless* v. *Flinchum*, 373.

5. A deed executed under undue influence will be rejected, such influence being fraudulent and controlling. *Wessell* v. *Rathjohn*, 377.

6. Where a father, having two daughters, executes a deed to one of them, though not founded upon adequate consideration, the deed will not be cancelled at the instance of the other daughter, unless actual fraud or undue influence be shown, and the burden to show such is upon the party alleging it. The law presumes such transaction to be proper, unless the contrary is shown. The relation of parent and child distinguished from that of guardian and ward, &c. *Ib.*

7. Where, in such case, after the death of the father, an action is brought by one daughter against the other (the grantee), demanding a cancellation of the deed and a division of the land, alleging that the same was executed under undue influence exerted by the grantee over the grantor, whose ill health had impaired his mind; and there was evidence not inconsistent with the integrity of the deed, the grantor having expressed himself satisfied with it; and the court charged the jury in substance that sufficient capacity must exist at the time of the act performed, otherwise the act would not be valid, although the party recovers such capacity, unless he afterwards acquiesced in the act or ratified it; *Held*, no error. *Ib.*

8. A deed of trust was executed to secure creditors (naming them), and authorized the trustee to divide the proceeds of the sale of property conveyed *pro rata* "amongst the said subscribing creditors, parties of the third part," but it was signed only by the trustor and trustee, and the trust accepted by the latter; *Held*, that the deed is binding on those who executed it, although it appeared that when it was drawn the secured creditors should also sign, and the same was properly admitted to probate and registration. *Moore* v. *Hinnant*, 455.

9. A deed is in law fraudulent upon its face, and so to be declared by the court, when a purpose appears to secure a benefit to the maker or to defraud creditors. And the court will also declare it to be so, where a fraudulent intent (the essential vitiating element) is found as a fact by the jury. But if the sole purpose of the maker be to discharge an honest debt, the deed does not fall within the operation of the statute of fraudulent conveyances. *Ib.*

FULLY ADMINISTERED, plea of, 416.

GRANT FROM THE STATE:

1. A copy of a grant from the register's office, which affirmatively shows that it was issued under the great seal of the state, is admissible in evidence, though it does not show the impress of the seal, or scroll to indicate it. *Aycock* v. *Railroad*, 321.
2. While the seal in such case may be necessary to authenticate the grant, yet it will be assumed that is was affixed as the law requires. *Ib.*

GUARDIAN AND WARD:

1. The interests of minors are under the care of the court, and to the end that the same may be protected in suits brought by or against them, the court should see that the *next friend* or guardian *ad litem* be appointed upon due consideration of an application in writing, and not upon a simple suggestion. *Morris* v. *Gentry*, 248–9.
2. A guardian who has received money by virtue of his office and for his ward, cannot exonerate himself from liability by showing that the money was due to the ward's father, who is a distributee of the estate from which it was derived. *Humble* v. *Mebane*, 410.
3. Such distributee has the same redress against the admininistrator of the estate for his share thereof as if the alleged misapplication had occurred in any other way; and the court *intimate* that, in case of the insolvency of the administrator, he may pursue the fund in the hands of the guardian who wrongly received it. *Ib.*
4. The plea of the statute of limitations in this case is defective, in that it fails to state when the cause of action accrued, and when the wards arrived at full age. An allegation to show that the statute has run and bars the action is essential. *Ib.*
5. The statute protecting sureties, remarked upon by SMITH, C. J.
6. Statute of limitations affecting guardian and ward, 420.

HOMESTEAD:

1. The assignment of homestead does not constitute color of title. It is not a conveyance, nor does it profess to pass title to the land, but simply attaches to the existing estate of the homesteader a quality of exemption from sale under execution. *Keener* v. *Goodson*, 273.
2. A homestead will not be allowed against a judgment founded upon a contract made prior to the adoption of the constitution of 1868. *Ib.*
3. A homestead is exempt from sale under execution, except (1) for taxes; (2) for obligations contracted for the purchase of the premises; (3)

for mechanics' and laborers' lien; (4) for debts contracted prior to the adoption of the constitution. THE CODE, §§501 to 524 inclusive. *Mebane* v. *Layton*, 396.

4. There is a presumption of fact in favor of such exemption, and the creditor who seeks to subject the homestead to the payment of his debt must bring himself within one of the exceptions by proper averment and proof. *Ib.*

5. A sale without laying off the homestead (unless in case of the above exceptions) is void, and passes no title to the land or to the "reversionary interest." *Ib.*

6. Where land is subject to the payment of debts against which, under the constitution, the right of homestead does not prevail, and the debtor has no other property but the land which is of less value than one thousand dollars, the sheriff need not have the homestead laid off in order to a sale under execution. *Miller* v. *Miller*, 402.

7. And the deed of the sheriff to the purchaser in such case is not affected by his failure to lay off the homestead. *Ib.*

HOMICIDE:

1. Where a prisoner makes an assault upon A, and is reassaulted so fiercely that the prisoner cannot retreat without danger of his life, and the prisoner kills A; *Held*, that the killing cannot be justified upon the ground of self-defence. The first assailant does the first wrong and brings upon himself the necessity of slaying, and is therefore not entitled to a favorable interpretation of the law. *State* v. *Brittain*, 481.

2. The killing being established, the offence is murder; and it is incumbent upon the prisoner to show circumstances of mitigation or excuse, to the satisfaction of the jury, unless the same arise out of the evidence on the part of the prosecution. *Ib.*

3. And if such proof puts the question of murder out of the way, the law of this state is that it is still incumbent upon the prisoner to show, in like manner, the circumstances of justification; and if he fails to do this, the offence is manslaughter. *Ib.*

4. If two men fight upon sudden quarrel and equal terms, the one upon provocation and the other upon a predetermined intention to kill, the fact that the latter would be guilty of murder if he slew his adversary cannot excuse the former if he should be the slayer. *Ib.*

5. Though a son may fight in the necessary defence of his father, yet the act of the son must receive the same construction as the act of the father would have received. *Ib.*

HOUSES, indictment for defacing, 531.

HUSBAND AND WIFE:

1. Where, in an action against husband and wife to recover the price of goods, the court charged the jury upon the testimony offered, that if the wife acted under the directions of the husband as his agent in the transaction, he is liable; and that it is not necessary to prove the agency by direct testimony, but the same may be inferred from the attending circumstances; *Held*, no error. But in such case no recovery can be had against the wife, whose coverture incapacitates her from assuming a personal obligation. *Webster* v. *Laws*, 224.
2. Deed of, 220; Contract of wife, 517 (3); Witness for and against, 559.

IMPEACHMENT OF JUDGMENT, 248.

IMPEACHMENT OF WITNESS, 523, 531 (3).

IMPLIED AND EXPRESS WARRANTY, 225 (3).

IMPRISONMENT, term of for burning mill, 507.

INADEQUATE PRICE, 10 (1).

INDICTMENT:

1. An indictment for removal of crop, in violation of the act of 1876-'77, ch. 283, §6, charging the defendant with removing the same "without satisfying all liens on said crop," is defective. The words of the statute, "before satisfying all liens held *by the lessor or his assigns* on said crop," should have been followed. *State* v. *Merritt*, 506.
2. On conviction of a defendant, indicted under the Revised Code, ch. 34, §2, for the wilful burning of a mill house, the court may sentence him to imprisonment in the penitentiary for not less than five nor more than sixty years. (Term of imprisonment, where indictments are drawn under different statutes, pointed out by SMITH, C. J.). *State* v. *Wright*, 507.
3. A motion in arrest of judgment should point out definitely the alleged defect in the indictment. *State* v. *Bryan*, 531.
4. The indictment in this case is sufficient to charge the defendant with the offence of defacing and damaging the jail. The general purpose of the statute (Bat. Rev., ch. 32, §§93, 28, 11) to protect houses from wilful injury, discussed by MERRIMON, J. *Ib.*

5. An indictment under Battle's Revisal, ch. 70, will not lie against a servant for wilfully leaving the employment of one with whom he had agreed to serve. The statute has reference only to persons enticing servants to unlawfully leave the service of the employer. *State* v. *Daniel*, 553.

INDICTMENT:

For larceny of crop, 466.

For embezzlement, 511.

For removal of fence, 551.

For carrying concealed weapon, 555.

For fornication and adultery, 559.

For libel, 568.

Trial of, by jury, cannot be waived, 563.

Against corporation—summons proper process, 584.

When ignored, no costs against prosecutor, 581.

INFORMAL VERDICT, practice relating to, 473 (2).

INJUNCTION:

1. An injunction will be granted until the hearing, where the plaintiff alleges irreparable injury and makes out an apparent case. *Marshall* v. *Commissioners*, 103.

2. When the injunctive relief sought is not merely auxiliary to the principal relief demanded in the action, but may be the relief itself, the court will not dissolve the injunction upon a preliminary hearing. *Ibid.*

3. The denial of an application for injunction on account of the want of a material averment and sufficient evidence, is no obstacle to granting a second similar application sufficient in form and supported by evidence. *Halcombe* v. *Commissioners*, 346.

4. Injunction against collection of tax, 154.

5. When granted in another action, effect of on right of appeal or to writ of *certiorari*, 191 (4).

INSOLVENT DEBTOR, deed of, 15, 264 (2, 3).

INTENT, special verdict must find, 480, 555.

IRREGULAR JUDGMENT, may be set aside, when, 581 (4).

ISSUES, preparation of, 209 (3); in ejectment, 384.

ISSUES OF FACT AND QUESTIONS OF FACT, 407.

JAIL, indictment for defacing, 531.

JEOPARDY, 535.

JOINT TRIALS, challenges in, 569 (4).

JUDGE OF SUPERIOR COURT:

1. A judge of the superior court has the power to vacate or modify orders made in a cause at any time before final judgment. *Welch* v. *Kingsland*, 179.

2. A judge has no power to render judgment after the expiration of the term of court without the consent of parties, except in cases where the law clothes him with jurisdiction at chambers. *Hardin* v. *Ray*, 364.

JUDGE:

New trial when office expires, 185.

May keep jury together, &c., 116 (7).

May direct special verdict in certain cases, 159 (3).

Discretionary power of, 482 (8); 523 (3).

JUDGE'S CHARGE:

1. There is no evidence in this case that the plaintiff mortgagee agreed to give his attention to securing and applying the crops conveyed as an additional security for his debt, and the court below erred in not so instructing the jury. *Kesler* v. *Mauney*, 369.

2. A judge, in granting a prayer for instructions, may add any explanation of the law bearing upon the facts embraced in the instructions. *Overcash* v. *Kitchie*, 384.

JUDGE'S CHARGE, 116 (5, 6):

Expression of opinion on facts, 159 (5).

On agency, 225 (2).

Recalling jury, 278 (3).

In action for seduction, 365.

As to fraud in deed, 373, 377.

In ejectment, 384 (5).

In larceny, 469, 472.

In forcible trespass, 565.

JUDGMENT:

1. A judgment recovered upon a bond for less than sixty dollars, in an action brought prior to the time when the Code of Civil Procedure went into operation, is a valid judgment. This case is governed by The Revised Code, ch. 31, §38, and it does not appear that the defendant availed himself of his right thereunder, either to *plead in abatement* or *move* to dismiss the suit. *Allen* v. *Simpson*, 19.

2. A judgment can be set aside for irregularity, only at the instance of the party prejudiced. *Hinsdale* v. *Hawley*, 87.

3. A judgment *non obstante veredicto* is granted in cases where the plea confesses a cause of action and the matter relied upon is insufficient. *Ward* v. *Phillips*, 215.

4. A judgment is not void because no complaint has been filed, especially where the action was commenced in a justice's court and the defendant filed an answer to the oral complaint, thereby waiving the right to object to the omission of the plaintiff to file a written complaint. *Little* v. *McCarter*, 233.

5. Judgments of a court in a case properly constituted before it, and where it has jurisdiction of the parties and the subject matter of controversy, are deemed to be valid, and will be upheld until impeached by a direct proceeding for that purpose. *Morris* v. *Gentry*, 248.

6. And although such judgments may afterwards be reversed, the rights of third persons honestly acquired thereunder will be protected; but otherwise, where such persons have knowledge of any irregularity or fraud in procuring their rendition. *Ib.*

7. The law presumes that a party to an action has notice thereof and a knowledge of its nature, but the contrary may be shown in a proceeding to attack the judgment therein. *Ib.*

8. Demurrer was overruled in court below with leave to defendant to answer over, and to plaintiff to amend complaint; *Held*, that although the demurrer in this case was sustained on appeal, yet no final judgment will be entered here, but the cause will be remanded for further proceeding under the leave granted in the court below. *Ib.*

9. A transcript of a justice's judgment containing the names of plaintiff and defendant, the amount of the judgment and costs of action, is sufficient. The law does not require the entire record to be sent up to be docketed. *Lee* v. *Bishop*, 256.

10. The validity of a judgment is not affected by the failure of a judge to sign it, since the statute providing for such signing is merely directory. *Keener* v. *Goodson*, 273.

11. The date of a judgment will be taken as the date of the debt upon which it was rendered, unless the contrary appear of record. *Mebane* v. *Layton*, 376.

12. Judgments are presumed to be correct until the contrary is shown. *State* v. *Lanier*, 517.

13. An irregular judgment may be set aside at the term ensuing its rendition, but an erroneous judgment must be corrected by appeal or *certiorari*. *State* v. *Horton*, 581.

JUDGMENT:

Summary against delinquent sheriff, 44.

Lien of, 64 (2).

Irregularity of, does not affect title, 256.

Rendered after term, void, 364.

JUDICIAL ACTS, 74.

JUDICIAL SALES:

1. A sale of land will be set aside when the price is shown to be inadequate; otherwise, it will be confirmed upon a favorable report of the commissioner, unless an offer be made to raise the bid ten per cent. *Vass* v. *Arrington*, 10.

2. The purchaser in such case acquires title from the day of sale; and the proceeds thereof are only subject to the charge of taxes due upon the land at that time. *Ib.*

JURISDICTION:

1. The jurisdiction conferred upon justices of the peace to try civil actions, where the property in controversy does not exceed fifty dollars, is concurrent with that possessed by the superior court. *Montague* v. *Mial*, 137.

2. An action for damages for removing a crop is cognizable in the superior court. The special jurisdiction of justices of the peace under the landlord and tenant act (1876–'77, ch. 283) does not extend to torts, but is confined to actions for enforcing contracts. *Ib.*

3. The advisory jurisdiction of the court will not be exercised in construing a will, where the estate devised is a legal one and the question of

construction purely legal. Such jurisdiction attaches to that over trusts, in directing trustees how to discharge their duties, incidentally involving a construction of the instrument creating the trust. *Albrook* v. *Reid*, 151.

4. Where a mistake occurs in an account and settlement in which the defendant gives his note to the plaintiff for the amount of the supposed balance due, and the plaintiff sues upon the note; *Held*, that the court, under its equitable jurisdiction, will open the settlement and allow the defendant to show such mistake by way of counterclaim. *Garrett* v. *Love*, 205.

5. The legislature has given to no court exclusive equitable jurisdiction, and whether this court has power to prescribe such a jurisdiction in pursuance of article four, section eight of the constitution, conferring jurisdiction over "issues of fact"—*Quære*. *Wessell* v. *Rathjohn*, 377.

6. In an action at law, this court cannot look into the evidence to see what facts it warranted a referee in finding. *Patterson* v. *Wadsworth*, 407.

7. The superiour court has jurisdiction under its general power to try assaults where no deadly weapon is used or serious damage done, in all cases where it has jurisdiction of the offence *charged*. After thus gaining jurisdiction, it will proceed with the case, even though the proof should show the offence to be less in degree than that charged. *State* v. *Ray*, 587.

JURISDICTION:

What necessary to give, 151.

When title to land is in controversy, 351 (2).

JURY:

1. Where a jury come into court and announce their inability to agree, the judge may, in the exercise of his discretion, require them to retire again and consider of their verdict, with an intimation that he will cause them to be kept together until the end of the term, unless they shall sooner agree. *Hannon* v. *Grizzard*, 115, 116.

2. A juror of the original panel is not subject to be challenged upon the ground that he had served upon a jury in the same court within two years: only *tales-jurors* who have thus served are disqualified by the statute. THE CODE, §1733, *proviso*. *State* v. *Brittain*, 481.

3. A juror cannot be examined as a witness to impeach the verdict of the jury of which he was a member. *Ib.*

4. Where the circumstances are such as merely put a suspicion on the verdict by showing, not that there *was*, but that there might have

been, undue influence brought to bear upon the jury because of the opportunity for it; *Held*, that the granting a new trial is discretionary with the presiding judge. *Ib.*

5. An oath administered to a juror in the manner prescribed by statute is sufficient; the juror need not repeat the words "so help me God." *State* v. *Paylor*, 539.

6. The proper time for polling a jury is after their announcement of the verdict. *State* v. *Sheets*, 543—4.

7. In polling the jury, one of them, upon calling his name, was asked to say whether the defendant was guilty or not guilty, and his reply was, "well, I suppose I must go with the rest"; the court thereupon directed him to respond "guilty or not guilty," and he answered "guilty"; *Held*, proper to receive and record the verdict. *Ib.*

8. Upon a joint trial, where each defendant had the opportunity afforded by the tender of the jurors to make his own challenges; *Held*, that the judge properly refused to allow the jurors forming the panel to be withdrawn and again tendered to one of the defendants to enable him to use his remaining challenges. *State* v. *Lyon*, 568—9.

JURY:

Separation of, 523 (3).

Trial by, cannot be waived in criminal cases, 563.

JUSTICES OF THE PEACE:

A new trial cannot be allowed in a justice's court, but the party dissatisfied with the judgment has his remedy only by appeal. THE CODE, §865. But where the judgment is rendered in the absence of either party, and such absence is occasioned by sickness or excusable neglect (§845), relief may be had by filing an affidavit before the justice, setting forth the grounds therefor, within ten days after judgment. *Gambill* v. *Gambill*, 201.

JUSTICES OF THE PEACE:

Removal of crop, jurisdiction, 137.

Title to land, jurisdiction, 551 (2).

Oral pleadings filed, 233 (3).

Transcript of judgment of, 267 (2).

JUSTIFICATION OF APPEAL BOND, 181 (2), 183, 220 (3).

LANDLORD AND TENANT:

1. The landlord's right to the crop to secure payment of rent is not impaired by the subletting of his tenant. The subtenant's crop may

thereby be subjected to a double lien, that of the landlord and that of his immediate lessor, but the lien of the landlord is paramount. *Montague* v. *Mial*, 137.

2. The landlord may bring claim and delivery to recover possession of crops raised by the tenant or cropper, where his right of possession under THE CODE, §1754, is denied, or he may resort to any other appropriate remedy to enforce his lien for the rent due and the advances made. *Livingston* v. *Farish*, 140.

3. The action will lie, not only where the crops are removed from the land leased, but also in a case where the tenant or cropper, or any other person, takes the crops into his absolute possession and denies the right of the landlord thereto. *Ib.*

4. In summary ejectment under the landlord and tenant act: Plaintiff leased to W and W assigned to the defendant; *Held*, upon the trial of an issue, whether the lease of the plaintiff to W was by the month, that testimony offered by the defendant to show that he leased from W by the year, was properly ruled out as irrelevant. *Waters* v. *Roberts*, 145.

5. The notice to quit given by the landlord, instead of by the immediate lessor, was sufficient. *Ib.*

6. A party, through his tenant, is *prima facie* the owner of the land, in the absence of other evidence, and is entitled to recover damages done to his possessory rights. *Aycock* v. *Railroad*, 321.

7. In an action brought in a justice's court by a landlord to recover the crop to secure rent alleged to be due under a contract of lease, the defendant tenant denied the contract and set up title to the land; and it appeared there had been an adjustment of the conflicting claims to the land, and an agreement entered into that the defendant should remain in possession of and cultivate the land upon payment of part of the crop as rent; *Held*, that the relation of lessor and lessee existed under the contract, which is supported by a sufficient consideration. *Durant* v. *Taylor*, 351.

8. *Held further*, that the justice of the peace has jurisdiction, as the title to the land is not in controversy—the action depending exclusively on the contract. But the defendant is not precluded from setting up title in a proper case, since an estate in land, other than a lease, cannot pass by parol. *Ib.*

9. A landlord has no right to enter upon land leased to his tenant and remove a fence therefrom against the consent of the tenant. *State* v. *Piper*, 551.

10. The court below erred in not holding the defendant to be guilty upon the facts found in the special verdict. *Ib.*

LANDLORD AND TENANT:

Jurisdiction, 137.

Larceny of crop, 466.

Removal of crop, 506.

LARCENY:

1. On trial of an indictment for larceny, charging the defendant with stealing a hog, the property of some person to the jurors unknown, *it was held*, that the testimony of witnesses, living in defendant's neighborhood, to the effect that they lost hogs about the time when the defendant "sold dressed hogs" and brought them to a witness in a cart covered with a cloth, one with its head off, the defendant denying the sale, and then admitting it in the same conversation, constitutes some evidence pertinent to the issue, and was properly left to the jury. *State* v. *White*, 462.

2. When a combination of facts and circumstances reveal the dignity of evidence, stated by MERRIMON, J., and the duty of the court in such case pointed out. *Ib.*

3. The charge of the court below upon recent possession approved. *Ib.*

4. An indictment against a tenant for the larceny of crops raised by him, which lays the property in the landlord and tenant as their joint and undivided property, cannot be sustained. *State* v. *McCoy*, 466.

5. A general owner of goods may be indicted for stealing the same from the special owner or bailee, but in such case the indictment must lay the property in the special owner. *Ib.*

6. The evidence in this case was sufficient to warrant the jury in finding a verdict of guilty. *State* v. *Freeman*, 469.

7. Indictment charged the larceny of "thirty dollars in money," and the proof was that defendant stole "three ten dollar bills"; *Held*, no variance. THE CODE, §1190. *Ib.*

8. Where, in such case, the court, in reference to the ten dollar bill found in defendant's possession recently after the theft, charged the jury that if they were satisfied it was one of the bills stolen, its possession by the defendant (although no presumption against him) was a fact which they might consider with the other testimony in the case; and if they found it was not a part of the money stolen, they should dismiss that fact from their consideration in passing on the other testimony; *Held*, that the charge is as favorable to the defendant as he had a right to expect, and his exception thereto is groundless. *Ib.*

9. On trial of an indictment for the larceny of cotton and receiving the same, knowing it to have been stolen, the jury found the defendant

"guilty of receiving stolen cotton"; *Held*, that the verdict is defective, in that it is not responsive to the charge in the indictment, and a *renire de novo* must therefore be awarded. *State* v. *Whitaker*, 472.

10. It is the duty of the court to look after the form and substance of a verdict, and, if it be informal, to direct the jury to reconsider it. *Ib.*

11. The bare removal from the place where goods are found by the thief (here, wheat from one garner into the defendant's adjoining garner at a mill) is a sufficient asportation to constitute larceny; and a severance from the constructive possession of the owner is also sufficient. *State* v. *Craige*, 475.

12. A motion in arrest of judgment cannot be grounded upon a variance between allegation and proof; it lies only for defects in the indictment. *Ib.*

13. A new trial will not be granted by this court for a variance between the allegation and the proof, where no exception is taken in the court below. The presumption is, that every fact necessary to sustain the verdict was proved on the trial. *Ib.*

See Embezzlement, 511.

LEAVE TO AMEND PLEADINGS, 241.

LEGISLATIVE EXTENSION, of time to pay tax, does not release surety on sheriff's bond, 44 (3).

LESSOR AND LESSEE:

1. Where a lease for ninety-nine years was executed, by which a tract of land was conveyed for mining purposes, the lessor covenanting that the lessee may enter upon the land and erect the machinery, &c., necessary to carry on mining operations, and that, if the same shall become unprofitable, he or his heirs might surrender the lease at any time; and the lessee covenanting to pay the lessor the one-tenth part of the gold or other metals procured upon the land; *Held*, there is an implied covenant on the part of the lessee that he will work the mine in a reasonable manner, and his failure to do so for a considerable period is a breach of such covenant, and works a forfeiture of the lease. *Conrad* v. *Morehead*, 31.

2. Express and implied covenants in a deed discussed by MERRIMON, J. *Ibid.*

See also pages, 145, 220 (2), 351 (1).

LIBEL:

1. The matter set out in the indictment in this case is libellous, and in order to the justification of the defendant, he must show that the entire charge imputed to the prosecutor is true. *State* v. *Lyon*, 568.

2. Proof of the general bad character of an officer in other matters of which he had taken cognizance, will not be received to establish the truth of a libellous charge in reference to a particular matter. *Ib.*

LIEN OF JUDGMENT, 64 (2).

LIFE ESTATE, reservation of, in deed, 220.

LIQUOR SELLING:

Indictment for selling liquor: Witness testified that he applied to defendant for liquor; defendant said he could not get it unless he had a bottle; witness got a bottle and gave it to defendant, together with a small sum of money; defendant went off, and in a short while returned with a bottle of whiskey, and said he charged witness a small sum for getting it, which was paid; *Held*, error in the court to charge the jury that, if they believed the evidence, the defendant was guilty, without further telling them to consider the *bona fides* of the transaction—the purchase by defendant as agent of the witness. *State* v. *Taylor*, 577.

LIQUOR SELLING:

Granting of license discretionary, 171.

Town ordinance prohibiting, 574.

LOCAL PREJUDICE, in removal of causes, 58 (2).

LOTTERY:

The defendant sold to customers small boxes of candy, of trifling value, for the chance or opportunity of designating one of certain pictures, conveniently arranged in his place of business, behind some of which were small sums of money, and behind others a card on which was the letter "C," the purchaser getting either the money or the card, accordingly as he may select; but if he got a card, he became entitled to another box of candy; *Held*, to constitute a lottery, and to be in violation of the statute. THE CODE, §1047. *State* v. *Lumsden*, 572.

MALICE, want of, no defence in action for damages for unlawful arrest, 287.

MALICIOUS MISCHIEF, ill will ingredient of, 544 (2).

MANDAMUS:

A *mandamus* will not lie to induct one into office, during the pendency of an appeal in *quo warranto* between the same parties. The judg-

ment of the court below in favor of the plaintiff is suspended by the appeal and the title to the office undetermined. *Hannon* v. *Commissioners*, 123.

MANDAMUS:

Officers cannot be reinstated by, where there is adverse claimant, 126 (3), 133.

Will not be granted to compel judge to certify case, when, 29 (2).

MARRIED WOMEN:

A married woman is not incapable of making a contract in respect to her separate property; she may recover and hold it and the income derived from it to her own use. *State* v. *Lanier*, 517; action against, 225 (2).

MASTER AND SERVANT:

Action for seduction arises out of relation of, 365.

Embezzlement by servant, 511.

Indictment for leaving service, 553.

MEASURE OF DAMAGES, 89.

MESSAGES, telegraphic, 334.

MILL, punishment for burning, 507.

MINISTERIAL ACTS, 74.

MINING OPERATIONS, lease of land for, 31.

MISTAKE:

In settlement, corrected, 95 (2).

In telegraphic message, 334.

Corrected in equity, when, 205 (2), 209 (2).

MONEY, larceny of, 469.

MORTGAGE:

1. Where A and B, joint vendors of land, take a mortgage and notes to secure the price, payable to each according to their respective shares;

Held, that a payment to A, who is also agent of B, discharges proportionately the debt to each, and a subsequent assignee of B cannot have an application of said payment wholly to A's interest. *Ely* v. *Bush*, 358.

2. Where, in such case, there has been a verbal agreement between the vendors and an assignee of the vendee to reduce the debt and change or release the respective liabilities of the parties, which agreement was only in part carried out; *Held*, in an action to enforce the mortgage and collect the unpaid residue of the reduced debt, if there are valid subsisting judgments for the unpaid mortgage debt and the vendee does not deny the liability, the assignee of B cannot insist upon the statute of presumption of payment from lapse of time as to the original debt, nor upon a bar by the act of limitations (C. C. P., §31), as to the reduced debt assumed by the assignee of the vendee. *Ibid.*

3. Evidence as to whether the mortgage debt has been paid is immaterial, in an action by the mortgagee against the vendee of the mortgagor, for the conversion of the personal property conveyed in the deed. *Bynum* v. *Miller*, 393.

4. A mortgagor conveys a stock of goods on hand and any other goods he may buy to replenish the stock, with power of sale if the debt is not paid by a certain time; *Held*, that by accepting the deed, the mortgagee assented to its provisions—to the mortgagor's continuing the business with the right to sell and replenish the stock, and constituting him an agent for that purpose. *Ib.*

MOTION IN THE CAUSE, 44 (1), 283 (2).

MOTION IN ARREST, 475 (2), 531.

MUNICIPAL BODY, power to remove officer, 125.

MUNICIPAL ORDINANCES, 574.

MURDER—See homicide.

NECESSARY EXPENSES OF COUNTY, 154, 346 (3).

NEGLIGENCE:

1. Where a railroad company permits dry grass or leaves or other combustible rubbish to remain near its track, and the same take fire from ignited sparks emitted from one of its locomotives which had no

spark-arrester, and the fire is thereby communicated to the plaintiff's adjoining land, destroying timber, &c.; *Held*, that the injury resulted from the negligence of the defendant company. *Aycock* v. *Railroad*, 321.

2. The negligence is presumed from the facts proved in this case, and the burden is upon the defendant to show that the locomotive was provided with the usual and proper appliances to avoid injury from the escape of burning sparks, and that there was no fault on the part of those managing the train. *Ib.*

3. In such a case, no contributory negligence can be imputed to the plaintiff, the injury being done to land and "the same condition of things" existing. *Ib.*

4. It was negligence to permit the inflammable material in which the fire begun to remain so near the company's track and liable to ignite from emitted sparks. *Ib.*

5. The defendant company is liable for the consequences of mismanagement of a train in charge of the employees of another company using its track with defendant's knowledge and consent. *Ib.*

6. The suggestion that the complaint does not disclose a cause of action, in that it does not negative concurring negligence in the plaintiff, has no force; the injury is to land, and no agency of the plaintiff could have averted it. *Ib.*

7. Remarks of the court in *Owens* v. *Railroad*, 88 N. C., 502, to the effect that the defendant must show concurring negligence in the plaintiff, approved. *Ib.*

NEGLIGENCE:

Of railroads and other common carriers, 311.

Complaint charging, 321, 331.

Of telegraph company, 334.

NEGOTIABLE INSTRUMENTS:

1. One who signs a note or bond cannot avoid his liability by showing that he was induced to execute the same by the fraud of his co-obligor, in which the obligee did not participate. *Vass* v. *Riddick*, 6.

2. Parties who subscribe their names as obligors to a bond are bound by its stipulations, whether their names are inserted in the body of the instrument or not. *Howell* v. *Parsons*, 230.

3. And a deed is also binding on the parties who execute it, although when drawn it appeared that secured creditors should sign it. *Moore* v. *Hinnant*, 455 (1).

NEW TRIAL:

When judge goes out of office, 185.

Not allowed in justice's court except under certain circumstances, 201.

For defective verdict, 472, 480.

Not granted for variance, 475.

When allowed at discretion of court, 482 (8).

When, for absence of accused, 539.

NEXT FRIEND, 249 (4).

NON OBSTANTE VEREDICTO, 215.

NONSUIT, action after judgment of, 273 (6).

NOTES AND BONDS—See Negotiable Instruments.

NOTICE:

To quit, 145 (2).

Of action, 248 (2, 3).

Of fraud, 264 (2, 3).

OATH, form of administering, 539.

OFFICE AND OFFICER:

1. The plaintiff was elected an alderman of the city of Raleigh, and excluded by a resolution of the defendant board from acting as a member thereof, and his seat declared vacant, upon the ground that he held "an office or place of trust or profit" under the United States government, at the time of his election as alderman, and was therefore ineligible under the constitution; *Held*, that the action of the defendants was not warranted by law. *Ellison* v. *Raleigh*, 125.
2. A municipal body cannot deprive one of its members of his place for causes affecting his ineligibility that existed at the time of his election. *Ib.*
3. But where, in such case, one is removed, and his successor elected and inducted into office under a power given to fill vacancies, such successor holds under color of competent authority, and is a *de facto* officer: and the plaintiff being the adverse claimant, cannot be reinstated by *mandamus* against the defendants, but must resort to *quo warranto*. *Ib.*
4. What is an office or place within the meaning of the constitution, and how far the court can go in restraining one improperly removed from office, but who may be ineligible to hold it (?). *Ib.*

5. An "office or place of trust or profit" must involve the exercise of functions affecting the public, in order to render the incumbent ineligible to hold a similar office or place. Under the facts of this case the plaintiff is not ineligible. *Doyle* v. *Raleigh*, 133.

6. This case differs from the preceding, in the fact that, after passing the resolution excluding the plaintiff and declaring his seat vacant, the defendants elected no successor to fill the vacancy; and it was held, here, that *mandamus* is the proper remedy for his restoration to office. *Ibid.*

7. The official character of one may be proved by parol in an issue between other parties. It is necessary to show the record of his appointment only in proceedings where the officer undertakes to justify his own conduct. *State* v. *Lyon*, 568.

8. Residence entitling one to hold office, 115.

OFFICIAL BONDS, action on, barred in six years, 95 (1).

OFFICIAL CHARACTER, proof of, 568 (2).

ORDINANCES OF CITY, 574.

PARENT AND CHILD:

Relation of will not sustain action for seduction, 365.

Deed between, 373, 377.

PAROL PROOF, of identity of property conveyed, 354.

PARTIES:

1. In an action by the plaintiff upon the defendant's bond to recover purchase money of land, a third person claiming title to the land adverse to the plaintiff is not a proper or necessary party. THE CODE, §§184, 189, construed by MERRIMON, J. *McDonald* v. *Morris*, 99.

2. Proper party to sue on county treasurer's bond is the commissioners, not the successor treasurer, 55 (1).

PARTITION:

Petition for, what to contain, 151.

Proceeding in, 283.

PARTNERSHIP:

Upon settlement of a partnership, the liabilities of the members growing out of the joint business were disposed of, leaving the plaintiff as

his separate property an unpaid claim due the firm; *Held*, that such claim no longer constitutes an item in the partnership account, and that the plaintiff is entitled to his action to recover the same. (This controversy grew out of relations existing between a creditor and a debtor firm, the defendant being a member of both; the character of the debt in such case stated). *Scott* v. *Green*, 278.

PENDING ACTION, 224.

PLACE OF TRUST OR PROFIT, 125, 126, 133.

PLEADING:

1. An answer denying "the truth of the averments contained in the first, second, third, fourth, fifth and sixth paragraphs of the complaint" (being the number contained in the complaint), is a specific denial of each allegation, and a sufficient compliance with THE CODE, §243. *Brown* v. *Cooper*, 237.
2. The plaintiff is not a competent witness in an action upon a bond executed prior to August 1st, 1868, except where the defendant relies upon the plea of payment in fact or upon a counterclaim, and introduces himself as a witness to establish such plea. Act of 1883, ch. 310, construed by ASHE, J. *Ib.*
3. This construction embraces a counterclaim, which is in the nature of a cross-action, when the plaintiff relies upon payment in fact. *Ib.*
4. Where leave is given a defendant to put in an amended answer, provided no matter be set up therein which will affect orders previously made in the cause, such amended answer will be stricken out if it is incompatible with the terms upon which the leave was granted. *Crump* v. *Thomas*, 241.
5. The motion to strike out the answer was made in apt time under the facts of this case. *Ib.*

PLEADING:

Where counterclaim is set up, 205.

Overruling demurrer when judgment not final, 249 (5).

In reference to concurring negligence, 321 (9), 331 (2).

Fully administered, 416.

POLLING JURY, 544 (5, 6).

POSSIBILITIES, when assignable, 78.

POWER, execution of, 451.

PRACTICE:

1. Where no case is settled on appeal and no errors are assigned in the record, the judgment of the court will be affirmed. *Neal* v. *Mace*, 171.

2. Where the transcript of the record fails to set forth facts necessary for the determination of the case on appeal, it will be remanded, to the end that the same may be supplied or found by the court below, as the nature of the cause may require. THE CODE, §965. *Bank* v. *Blossom*, 341.

3. This court will not pass upon exception to the charge of a judge, in the absence of a statement of the evidence to which it applies, and in such case a writ of *certiorari* will be granted to supply the same. *State* v. *Kennedy*, 589.

PRACTICE:

In reference cases, 52, 410.

In attachment, 62.

In justice's court, appeal, 201.

In framing issues, 209 (3).

In partition, 283.

In making preliminary statement to jury of what party expects to prove, 543.

PRELIMINARY STATEMENT, to jury, 543.

PRESENCE OF ACCUSED DURING TRIAL, 539, 544 (8).

PRINCIPAL AND AGENT, 159 (4—6).

PROBATE OF WILL, 428, 433.

PROCEDENDO, 283.

PROCESS:

Civil, cannot be served by special deputy, 565 (3).

Summons, to bring corporations into court, in both civil and criminal actions, 584.

PROSECUTION, costs of—See costs.

PUNISHMENT, for burning mill, 507.

PURCHASER:

Title of, under execution sale, 10 (2).

At sale for taxes, 215 (2).

Of goods, title of, 225 (3).

QUANTUM MERUIT, 89.

QUO WARRANTO, 123, 126 (3).

RAILROAD TAX CASES:

1. A statute imposing a tax upon the gross receipts of some railroad companies and upon the capital stock of others, is unconstitutional, as not levying taxes by a uniform rule. *Worth* v. *Railroad*, 291.
2. A charter which declares that the property of a railroad company and the shares therein shall be exempt from any public charge or tax whatever," exempts the company from all taxation, whether upon gross receipts or capital stock, for such charter is a contract and protected by the federal constitution. *Ib.*
3. The charter of the defendant company exempts its property from any charge or tax whatever, and a franchise is property. *Worth* v. *Railroad*, 301.
4. A tax imposed directly by the legislature upon a corporation, or its gross receipts, or the cash value of the shares of its capital stock, or upon each mile of its road at a certain sum per mile, and not assessed by assessors, is a franchise or privilege tax. *Ib.*
5. The franchise, capital stock, property consisting in land and machinery, &c., shares of capital stock, and profits arising from the business of a corporation, are each the subject of distinct taxation. *Ib.*
6. Where the charter vests the corporate property in the stockholders, and exempts it from taxation, the individual stock is also exempt. *Ib.*
7. Under article five, section three of the constitution, the same rule of uniformity applies to the taxing of "trades, professions, franchises and incomes," as to the other species of property therein named; and there must also be uniformity in the mode of assessment. *Ib.*
8. A tax upon any occupation must reach all who follow it—all of a *class*, either of persons or things. *Ib.*

9. The act of 1881, ch. 116, class II, §2, repealing all exemptions of taxation contained in acts of incorporation granted before or since July, 1868, noticed, and its effect considered. *Ib.*

RAILROADS:

Liability of, as common carriers, 311.

Negligence of, when fire occurs from sparks, 321 (4).

Suit against, sufficient to designate by corporate name, 331.

Stipulation for exemption from liability, 334 (3).

Summons against, in civil and criminal actions, 584.

RAPE:

On trial of an indictment for an assault with intent to commit rape, evidence that the prosecutrix, while going alone to the house of an acquaintance, in the night time, was pursued by the defendant, who seized her around the neck with both hands and threw her down and put his hand over her mouth to prevent her from making outcry, was held to have been properly left to the jury upon the question of intent, and warranted a verdict of guilty; *Held further*, that evidence of what the prosecutrix told a witness, into whose house she sought refuge, in regard to the assault upon her, was admissible in corroboration of the testimony of the prosecutrix. *State* v. *Mitchell*, 521.

RECEIVERS:

1. A receiver will not be appointed *pendente lite*, upon a mere allegation that the party has reason to believe the property in dispute will be wasted or destroyed. The application in such case must state the grounds of apprehension, and the judge determines the reasonableness thereof upon the facts found by him. *Hanna* v. *Hanna*, 68.

2. Where a receiver is alleged to have committed a breach of trust, the party complaining must first obtain a rule requiring him to render an account, and, if default be found, apply to the court for leave to sue his bond. In this case, the refusal of the motion for judgment upon the bond was proper. *Atkinson* v. *Smith*, 72.

RECENT POSSESSION, 463 (3), 469.

RECITAL IN DEED, evidence of execution sale, 402 (4, 6).

RECORD, when transcript defective, case will be remanded, 341.

RECORDARI:

Upon petition for the writ of *recordari* a notice was served upon the adverse party to show cause, &c., and he appeared with affidavits in

opposition to the granting the writ; *Held*, error in the judge to refuse to entertain the affidavits. The practice in applications for writs of *recordari* and *certiorari* touched upon by SMITH, C. J. *Weaver* v. *Mining Co.*, 198.

REFERENCE AND REFEREES:

1. The report of the commissioners appointed in pursuance of the act of 1879, ch. 149, assessing persons for benefits accruing to their lands from the operations of the plaintiff canal company, should have been confirmed by the court, as to those defendants who did not object; but as to those who did, the court should have proceeded to try the issues involved in the controversy. The case is not presented in such manner as to enable this court to pass upon the merits. *Canal Co.* v. *McKeithan*, 52.
2. Where the report of a referee in the statement of an account does not conform to the order of reference, the court will set it aside with instructions to observe strictly, in restating the account, the method pointed out in the order of the court. *Burke* v. *Turner*, 246.
3. The court will not set aside a report and order a re-reference upon the ground of informality, where the report furnishes the information required. *Gulley* v. *Macy*, 343.
4. In a case like this, the court is vested with discretion in the matter of allowing costs, under THE CODE, §527: each party is ordered to pay his own, and each to pay one-half of the allowance to the referee. *Ibid.*
5. A reference to take an account is irregular where a defence is set up to the entire action, and the allegations of fact, if found to be true, would defeat the plaintiff's recovery, and in such case the court should direct the issues to be tried; but otherwise, where the defence relied on is no obstacle to the recovery. *Humble* v. *Mebane*, 410.
6. No appeal from order recommitting report, 186, 188.
7. Under THE CODE and to arbitrators, distinction, 273.

REMAINDERS:

Contingent remainders, executory devises, and other possibilities coupled with an interest, are assignable. *Bodenhamer* v. *Welch*, 78.

REMANDING CAUSE FOR FACTS, 341.

REMOVAL OF CAUSE TO FEDERAL COURT:

1. To entitle a party to the removal of a cause to the federal court, under the act of congress of 1875, there must exist in the suit a separate

and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other. *O'Kelly* v. *Railroad*, 58.

2. The act authorizing such removal has no application to cases of mere local prejudice—approving *Fitzgerald* v. *Allman*, 82 N. C., 492. *Ib.*

REMOVAL OF CROP:

Remedy for, 140.

Indictment for, 506.

REMOVING FENCE, indictment for, 551.

RESCINDING CONTRACT, 89.

RESERVATION OF LIFE ESTATE, 220.

RESIDENCE, 115.

RETAILING LIQUOR:

Granting license discretionary, 171.

Town ordinance forbidding, 574.

Evidence on trial of indictment for, 577.

REVENUE, collection of, 44.

REVERSIONARY INTEREST, sale of, 396 (3).

RIGHTS ACQUIRED UNDER JUDGMENT, 248 (2).

SEAL TO STATE GRANT, 321 (2).

SECTION 133—THE CODE, §274—See pages 39, 581 (3).

SECTION 343—THE CODE, §590—See pages 159, 369.

SEDUCTION:

In an action by a step-father to recover damages for the seduction of his step-daughter, a recovery cannot be had unless the plaintiff had, at the time, the control of her services. Such action arises by the fiction

of the law from the relation of master and servant, and not from that of parent and child; *Therefore*, it was error in the court to refuse to charge that, if the jury should find she was seduced by the defendant while she was away from the house of the plaintiff and not in his service, but in the employ of a third person, the plaintiff cannot recover. *Kinney* v. *Laughenour*, 365.

SEPARATION OF JURY, 523 (3).

SEPARATION OF WITNESSES, 42.

SERVANT LEAVING EMPLOYEE, 553.

SETTING ASIDE JUDGMENT, 87.

SHERIFF:

Summary judgment against, 44.

Liability of, for failure to apply proceeds, 64 (1).

Deed of, 215 (2), 402 (4—6).

SIGNING OF JUDGMENT NOT NECESSARY, 273 (2).

SILENCE, when party affected by, 83 (3), 527.

SON FIGHTING IN DEFENCE OF FATHER, 482 (5).

SPECIAL VERDICT:

When court has power to direct, 159 (3).

Intent must be found, 480, 551.

SPECIFIC PERFORMANCE OF CONTRACT, 354.

STATUTE OF FRAUDS, 233 (1).

STATUTE OF PRESUMPTIONS AND LIMITATIONS:

1. Where an insolvent debtor executed a deed in trust conveying land to secure a creditor, and in an action to prevent the sale of the land the issue was whether the debt had been paid, it was held competent for the debtor to show the value of the land conveyed, to sustain the statutory presumption of payment. *Wiley* v. *Lineberry*, 15.

2. Whatever effect the insolvency may have upon other creditors, it cannot avail the creditor in this case who has a security for the debt, for as to him the debtor is not insolvent. *Ib.*

3. The statute allowing actions to be brought *within* a year after judgment of nonsuit is intended to extend the period of limitation, not to abridge it. *Keener* v. *Goodson*, 273.

4. Where, in a suit on a guardian bond, one of the plaintiffs, a *feme* covert, arrived at full age in 1865, married in 1867, and commenced the suit in 1876; *Held*, that the statute did not bar her right to recover. The interval of two years between the termination of disability of infancy and the commencement of that of coverture, is bridged over by the act suspending the operation of the statute from May, 1865, to January, 1870. *Davis* v. *Perry*, 420.

5. The statute of limitations barring actions for relief on the ground of fraud after three years from the discovery of the facts constituting fraud, prior to the amendatory act of 1879, ch. 251, does not apply to a case where no fraud, but only a mistake, is alleged. *Mask* v. *Tiller*, 423.

6. The enforcement of an equity will never be denied, on the ground of lapse of time, where the party seeking it has been in continuous possession of the estate to which the equity is an incident. *Ib.*

7. The court will lend its aid in every such case, except where, by laches, the party has abandoned his right and acquiesced in its enjoyment by another in a manner inconsistent with his own claim. *Ib.*

STATUTE OF LIMITATIONS:

Against official bonds, 95 (1).

Where an agency is terminated, 159 (5).

In mortgage transactions, 359 (2).

In guardian matters, 410 (4).

In executors and administrators, 416.

SUBLETTING, does not affect landlord's lien for rent, 137 (3).

SUMMARY EJECTMENT, 145.

SUMMARY JUDGMENT, against delinquent sheriff, 44.

SUMMONS, proper process in criminal action against a corporation, 584.

SUPERIOR COURT:

Power of, over interlocutory orders, 179.

Jurisdiction in cases of assault, 587.

SUPREME COURT:

Jurisdiction over issues and questions of fact, 407.

Will not pass on question of law in absence of facts relating to same, 589.

SURETY:

On sheriff's bond, not relieved by legislative extension of time for sheriff to settle state tax, 44.

Surety and principal, 410 (5).

SURVIVORSHIP, 220.

TALES-JURORS, challenging, 482 (6).

TAXATION:

1. A motion in the cause is the proper remedy to impeach a summary judgment rendered in pursuance of the revenue act, by the clerk of Wake superior court, upon the bond of a delinquent sheriff. *Worth* v. *Cox*, 44.
2. The act of assembly authorizing the summary method of obtaining judgment against a sheriff who is delinquent in settling state taxes, is constitutional, and the settled law of this state. *Ib.*
3. A legialative extension of the time within which a sheriff may settle state taxes does not exonerate the sureties upon his bond. *Ib.*
4. The collection of the revenues is under the controlling power of the legislature, and sheriffs and their bondsmen are affected with notice thereof and subject to its exercise. It enters into and becomes a part of their contract with the state, and is as binding as any express condition of the bond. *Ib.*
5. Taxation for necessary expenses of county, 154, 346 (3).
6. Taxation of railroad companies and other corporations, 291, 301.

TAX TITLE, deed of sheriff, 215 (2).

TELEGRAPH COMPANIES:

1. A stipulation contained in a form used by a telegraph company in its business operations, to the effect that it will not be responsible for

mistakes in transmitting unrepeated messages, is a reasonable one. *Lassiter* v. *Telegraph*, 334.

2. The plaintiff's cotton factor sent to plaintiff the following unrepeated message: "Can get ten and three-eighths for your cotton—answer"; and that delivered to plaintiff contained the word "fourths" instead of eighths;" and thereupon the plaintiff at once directed a sale of the cotton; *Held*, in an action for damages for loss alleged to have been sustained by reason of the mistake, that the plaintiff is not entitled to recover. *Ib.*

3. In such case, the exemption from liability does not extend to cases where there is gross negligence on the part of the company or its employees. *Ib.*

(Mr. Justice ASHE dissenting).

TENANTS IN COMMON:

1. An action of claim and delivery by one tenant in common against another to recover possession of personal property cannot be maintained, unless the same has been destroyed or carried beyond the limits of the state. *Strauss* v. *Crawford*, 149.

2. A petition for partition must give a description of the land, and set forth that the parties are tenants in common and in possession, in order to give the court jurisdiction. *Alsbrook* v. *Reid*, 151.

3. Partition of land was had, report of the commissioners confirmed, and final judgment entered; *Held*, no error to deny the motion of a complaining tenant to have the report remanded to the commissioners for the correction of an alleged mistake in running a dividing line. But the appropriate course in such case is for the judge to direct his ruling to be certified to the probate court to dismiss the application. *Thompson* v. *Shamwell*, 283.

4. This cause being ended, the remedy (if any, after an acquiescence of seven years) is not by motion, but by a new action commenced by summons. *Ib.*

5. One of several tenants in common may sue in ejectment and claim the entire estate, and, upon a recovery, will have judgment for such share in common as he shows himself entitled to. But here there are no facts to support the instruction asked by defendant in reference to the alleged tenancy in common. *Overcash* v. *Kitchie*, 384.

TITLE BOND, 264.

TITLE OF PURCHASER, 225 (3).

TOWNS AND CITIES:

1. Town ordinances must be subordinate to and harmonize with the general law of the state, unless special powers are conferred upon the town by its charter. *State* v. *Brittain*, 574.
2. Therefore, in the absence of special authority over the subject, *it was held*, that an ordinance prohibiting the sale of liquor within the corporate limits of a town is void, as the general law allows retailing upon obtaining license. *Ib.*
3. *Quære*, whether the legislature can authorize a town to make an offence against the state a separate offence against the town. *Ib.* See also pages, 125, 126.

TRANSACTION WITH PERSON DECEASED, 159.

TRANSCRIPT, defective, case remanded, 341.

TREASURER OF COUNTY:

Commissions of, 55 (2).

Settlement with, 95 (2, 3).

TRIAL:

1. The separation of witnesses by sending them from the court-room is not a matter of right. And even where such order is made, and one who remained and heard the other witnesses is permitted to testify, it was held that the granting a new trial is a matter of discretion in the presiding judge, and not reviewable. *Purnell* v. *Purnell*, 42.
2. Only such issues as arise upon the pleadings should be submitted to the jury, and it is the duty of the court to determine what they are. The law and practice in reference to pleading and framing issues, discussed by MERRIMON, J. *Miller* v. *Miller*, 209.
3. The exception based upon the pending of another action between the same parties cannot be entertained under the facts of this case. *Webster* v. *Laws*, 224.
4. It is discretionary with the presiding judge whether he will recall the jury and submit instructions which were not presented until the charge was finished and the jury had retired to consider of their verdict. *Scott* v. *Green*, 278.
5. In misdemeanors of the lesser grade, the question of new trial on account of the separation of the jury, is a matter of discretion with the presiding judge. *State* v. *Barber*, 523.
6. It is the duty of the judge, upon finding the fact that a juror fraudulently procured himself to be put on the jury, for the purpose of

acquitting the prisoner in a trial for murder, to withdraw a juror and direct a mistrial to be entered, *State* v. *Bell*, 81 N. C., 591; and this, whether the prisoner be connected with or cognizant of the fraud or not. In such case, there is no jeopardy, and the order remanding the prisoner for trial before another jury was proper. *State* v. *Washington*, 535.

7. *Held further*, that even though no formal motion is made for the prisoner's discharge in the court below and denied, yet this court will, on his petition for *certiorari*, consider his claim for exemption from another trial. *Ib.*

8. The absence of a defendant from the court-room during the argument of counsel to the jury, on trial for an indictment for an offence not capital, the defendant's counsel being present, does not constitute ground for a new trial, unless it be made clearly to appear that the defendant was prejudiced thereby. *State* v. *Paylor*, 539, and *State* v. *Sheets*, 543—4.

9. The law in reference to the right of the accused to be present during the trial, in capital cases and in those of a lower grade, reviewed by ASHE, J. *Ib.*

10. A preliminary statement of what a party expects to prove may be made to the jury, in both civil and criminal cases. It is a practice which has long prevailed in this state. *State* v. *Sheets*, 543.

11. The absence of defendant from the court-room at the time the court rehearsed a part of the evidence to the jury, on trial of an indictment for a misdemeanor, the defendant being out on bail and his counsel being present and making no objection, does not constitute ground for a new trial, especially where no prejudice resulted to the defendant. *Ib.*

12. A trial by jury in a criminal action cannot be waived by the accused. *State* v. *Stewart*, 563.

13. On trial of an indictment for an assault and battery, a jury trial was waived and the court, by request, found the facts and declared the law arising thereon; *Held*, that such a procedure is not warranted by law, and the case will be remanded for trial. *Ib.*

TRUST AND TRUSTEES:

Advice as to administration of, 151 (2).

In agency, 159 (5).

TRUST TO SECURE CREDITORS, 107.

UNDERTAKING ON APPEAL, must be justified by at least one surety, 181, 183.

UNDUE INFLUENCE, 377 (2).

UNLAWFUL ARREST, damages for, 287.

VACATION OF JUDGMENT, 87.

VARIANCE, will not support motion in arrest, 475 (2).

VARIATION OF COMPASS, evidence of, admissible, 384 (5).

VENDOR AND VENDEE:

A purchaser of goods cannot resist a recovery for the price by setting up a defect of title in his vendor, and showing a paramount title in a third person who does not himself assert his claim. In case the purchaser's possession is disturbed, he has a remedy upon the warranty of title, express or implied, in the act of sale and delivery by the vendor. *Webster* v. *Laws*, 224. See also pages, 225 (2, 3), 358.

VERDICT:

1. The finding of a jury, in an action for damages for an assault, that the defendant acted in self-defence, renders the issue as to damages and the finding thereon immaterial. *Purnell* v. *Purnell*, 42.
2. The court has the power under THE CODE, §409, to direct a special finding upon an issue in an action for an account and settlement of a trust fund, and so also in all other cases except where the suit is for "money only" or "specific real property." *Commissioners* v. *Lash*, 159.
3. A special verdict must find, as a fact, the intent with which the offence charged was committed, in cases where the intent is an ingredient of the offence. *State* v. *Bray*, 480.
4. Where a special verdict is defective, a *venire de novo* will be awarded. *Ibid.*
5. Verdicts are presumed to be correct until the contrary is shown. *State* v. *Lanier*, 517.

VERDICT:

In larceny, when defective, new trial awarded, 472.

Presumption in favor of correctness of, 475 (3).

Impeachment of, and suspicion on, 482 (7, 8).

VOTING PLACE, 115.

WAIVER:
Of justification of appeal bond, 220 (3).
Filing complaint, 233 (3).

WARRANTY, of title to goods and realty, 225 (3).

WILLS:
1. Where a script has been proved by the executor without citation or notice to those interested in the decedent's estate, they are entitled to have the probate set aside, and to an order for repropounding the will, if applied for within a reasonable time after notice of the former probate, to the end that its validity may be inquired into; and under the present statute, the application need not set forth the grounds upon which the script is impeached. *Randolph* v. *Hughes*, 428.
2. The law r elating to the method of procedure is entering a *caveat*, and the decisions bearing upon the question commented on by SMITH, C. J. *Ib.*
3. A script was offered for probate in the proper court and a *caveat* entered, and an issue *devisavit vel non* drawn and the case docketed for trial; the matter was compromised by the parties, and, by agreement, a verdict finding the script not to be the will of the deceased was recorded; *Held*, in an action to recover land, the writing cannot be put in evidence as a muniment of title, with an unreversed judgment against it in the probate court; nor can the same be set up and established as a will in a collateral proceeding. *Osborne* v. *Leak*, 433.
4. The probate of a will in the proper court is an indispensable prerequisite to its validity as a conveyance of real or personal estate. THE CODE, §2174. *Ib.*
5. Since the passage of this act in the Revised Code, all wills must be admitted to probate under its directions, without reference to the date of the execution of the will or death of the testator; and an exception that its retroactive operation impairs vested rights cannot be sustained. *Ib.*
6. The law, as it formerly existed under the Revised Statutes, ch. 122, §9, and the establishment of the will in an action to recover possession of the devised land, under the English practice, discussed by SMITH, C. J. *Ib.*
7. The testator devised land and bequeathed personal property to his wife, "if she remains a widow, and if she marries she is only to have a child's part"; and in a subsequent clause says: "I do authorize my wife with authority and power that, at her death, to divide this property among our children as she sees proper"; *Held*, that the widow takes a fee-simple estate in the land. The contingent limitation in

case of her marriage is referable only to the personal property. *McKrow* v. *Painter*, 437.

8. Where, upon the face of the writing itself, a doubt arises as to whether it was intended to be a will, parol testimony is admissible to explain the meaning of the supposed testator. The writing offered in this case, as operating a revocation of the will of the testator, contains none of the elements of a testamentary paper, and hence cannot be helped by evidence *aliunde*. *Davis* v. *King*, 441.

9. The word "effects" used by a testator in disposing of his estate will be construed to include land, where it can be collected from other parts of the will that such was the tetsator's intention. *Page* v. *Foust*, 447.

10. A testator directed his land to be sold at public auction, and the money arising therefrom to be divided among his children; *Held*, that upon the death of the testator, the legal estate does not vest in the executor of the will, but descends to the heir, to be held until the power is executed. *Beam* v. *Jennings*, 451.

11. If the will does not devise the land, but creates a power to sell it, then, upon the execution of the power, the purchaser is in under the will; but in the meantime, the land descends and the estate is in the heir. The power is not the estate, but only an authority over it and a legal capacity to convey it. *Ib.*

12. Advice of court as to construction, 151 (2).

WITNESS:

1. A party to a suit, though in his corporate capacity, is not competent to testify as to a transaction with a person deceased. *Commissioners* v. *Lash*, 159.

2. A witness, principal debtor, in an action by the plaintiff against the estate of his deceased surety, is not disabled by THE CODE, §590 (C. C. P., §343), from testifying for the defendant administrator as to what occurred in a transaction between the plaintiff and the deceased, or as to what the deceased swore on a former trial. And the plaintiff, in his testimony in reply, is restricted to the transaction to which the evidence of the first witness was directed. *Kesler* v. *Mauney*, 369.

3. A witness may be allowed to refresh his memory by reading a paper-writing or having the same read to him. *State* v. *Lyon*, 568—9.

WITNESSES:

Separation of, 42.

Competency of, 237 (2).

Impeachment of, 523, 531 (3).

In fornication and adultery, 559.